

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

TRANSCRIPT OF TELEPHONIC DISCOVERY HEARING
HONORABLE JUDGE JOEL C. HOPPE PRESIDING
TUESDAY, FEBRUARY 12, 2019

25 Proceedings recorded FTR and transcribed using Computer-Aided
Transcription

A P P E A R A N C E S

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1 (Telephonic proceedings commenced at 12:31 p.m.)

2 THE COURT: Hi, this is Joel Hoppe. Who is on the
3 line for the plaintiff?

4 MS. TENZER: Good afternoon, Your Honor. This is
5 Gabrielle Tenzer at Kaplan Hecker & Fink on behalf of the
6 plaintiffs. I'm here with my colleague Chris Greene. And I
7 believe there are others on the phone on behalf of plaintiffs
8 who are dialed in from other locations.

9 MS. PHILLIPS: Hi, Your Honor. This is Jessica
10 Phillips from Boies Schiller Flexner, I'm also on the line for
11 plaintiffs.

12 MR. LEVINE: And Alan Levine from Cooley,
13 Your Honor, along with Michael Bloch from Kaplan Hecker &
14 Fink.

15 THE COURT: All right. Good afternoon, you all.

16 And then who do we have on the line for the
17 defendants?

18 Mr. Kolenich, are you on the phone?

19 MR. KOLENICH: Yes, sir, I'm with Mr. Kessler and
20 various other defendants.

21 THE COURT: All right. How about Mr. DiNucci?

22 MR. DINUCCI: I'm here, Your Honor, for Mr. Spencer.

23 THE COURT: All right. And let's see, who else do
24 we have on the line?

25 MR. JONES: Bryan Jones here for League of the

1 South.

2 THE COURT: All right.

3 MR. CAMPBELL: Good afternoon, Judge. This is Dave
4 Campbell for James Fields. Just jumped on here a little late.

5 THE COURT: Okay. Well we were just figuring out
6 who's on the phone, so you haven't missed anything.

7 All right. Anyone else on the line?

8 Okay. Counsel, this call is being recorded by the
9 court's FTR system, so there is a record of the call.

10 And as I understand it, Ms. Tenzer, from your
11 e-mail, there's some deadlines that you would like to have set
12 so that discovery can move forward and come to a completion in
13 very short order, recognizing that we're really about two
14 months away from the close of discovery.

15 MS. TENZER: Yes, Your Honor. Thank you.

16 If it's okay, I'll sort of lay out for the Court
17 where things stand and the issue at hand. I think it's pretty
18 straightforward. As you know, the Court ordered the
19 collection and imaging and production of ESI from the
20 defendants' devices and social media accounts. And as part of
21 that stipulation and order, the parties were to enter into a
22 contract with a third-party vendor as the first step in that
23 process. We sent the draft contract to the defendants at the
24 end of December. It's now almost mid-February and we still
25 don't have an executed contract. So that's the first order of

1 business.

2 But due to the challenges of getting the contract in
3 place, we're, you know, equally if not more concerned about
4 what will ultimately happen once the contract is, in fact, in
5 place. In order to go through this process, the vendor is
6 going to need actual physical access to the defendants'
7 devices; their phones, their computers. They're going to need
8 credentials so that they can access those devices, as well as
9 their social media accounts. And based on the length of time
10 it has been taking to get even just the contract in place,
11 we're very, very concerned with how the rest of the process is
12 going to move forward.

13 Just to give Your Honor a sense, we understand from
14 the vendor that even once the contract is signed and they have
15 access to the accounts and the devices, it's probably going to
16 take them, you know, assuming everything actually goes
17 smoothly, about a month on their end to do all the collection
18 on the processing on the front end and the back end. So that
19 doesn't even include the time that the defendants' counsel
20 would require to review the documents before they're -- they
21 select which documents are relevant and not privileged to be
22 produced to us.

23 So even if the contract were signed this week, which
24 we hope that it can be, realistically, if everything goes
25 well, unfortunately, it looks like we wouldn't see any

1 documents from the defendants until probably April.

2 So we would like to discuss with the Court a way of
3 ensuring that the process moves forward as expeditiously as
4 possible, but we also wanted to raise with the Court,
5 unfortunately, what seems to be the fact that the documents
6 won't be available to us until at least April. And, you know,
7 we feel that there -- you know, due process entitles us to be
8 able to obtain and review those documents before we notice
9 defendants' depositions, so we have a bit of a scheduling
10 conundrum.

11 THE COURT: All right. Well, let's -- let's address
12 any scheduling issues at the end.

13 Mr. Kolenich, why don't we start with you. What's
14 going on with the contract?

15 MR. KOLENICH: Thank you, Your Honor. I think
16 there's only one issue remaining with the contract. We've had
17 a couple productive calls with the third-party vendor,
18 plaintiffs' counsel and defense counsel and there's just one
19 issue, in my opinion, that's holding things up, or at least
20 that's holding me up from signing the contract, which is this
21 indemnification clause. They want us to indemnify them up to
22 a million dollars for any third parties that might sue them
23 because information, their private information that's on my
24 client's devices would be then in possession of a third-party
25 vendor or potentially, you know, lawyers' offices, plaintiffs'

1 lawyers and so forth.

2 And I think that, you know, we raised objection
3 collectively, the defendants, that we shouldn't have to
4 indemnify them for just anything, but only for our own acts or
5 omissions. And I think we sort of agreed with that, but the
6 third-party vendor wasn't happy with that. So we're in the
7 process of working that out. I think a couple potential
8 solutions present themselves. One is that the plaintiffs
9 agree to do that indemnification while retaining their right
10 to come to court. The main contribution from us if
11 indemnification actually is necessary. The other is that the
12 court simply orders us to sign that, which independent of our
13 inability to actually pay the indemnification, or just put in
14 the contract that the third-party vendor understands that
15 defendants, or at least certain defendants who have
16 represented to this court that they can't afford this, can't
17 afford the indemnification either. So something simple like
18 that would solve it and then at least my clients would be able
19 to sign the contract.

20 As to the rest of Ms. Tenzer -- well, you wanted to
21 put that off until later, so that's all I have, Your Honor.

22 THE COURT: Okay. And Mr. DiNucci, Mr. Jones,
23 Mr. Campbell, is that your concern as well with the contract?
24 Are there any additional concerns or issues?

25 MR. DINUCCI: This is John DiNucci. I join in

1 Mr. Kolenich's remarks. If I remember correctly, I'm looking
2 right now at the last draft indemnification language which I
3 believe came from the third-party vendor. The way I still
4 read it is if somebody, meaning not the defendants, were to
5 call as a witness somebody from the third-party vendor, the
6 defendants would be responsible for paying the third-party
7 vendor's fees, which I don't understand. But I certainly join
8 in Mr. Kolenich's concern as well. I mean, and that is, as
9 Mr. Kolenich indicated, at least as I recall, the only issue
10 the language in this indemnification provision.

11 We've had several conference calls with plaintiffs'
12 counsel about it. There's been an exchange of e-mails and I
13 think I sent a letter on the defense side sometime ago. So
14 we've been working towards conclusion and then we get this
15 notice that plaintiffs want a conference call with Your Honor.

16 So we're close, it's just this indemnification
17 language is tricky. And I got to -- I mean, how do you foist
18 that upon your client, say sign something that's going to make
19 you liable for somebody else's mistake?

20 THE COURT: Well, and is this -- the indemnification
21 provision, this is something that the third-party vendor is
22 insisting on?

23 MR. DINUCCI: That's one way to interpret. The last
24 e-mail I saw was from Miss Brennan and it's dated February
25 the 4th. And she indicated IES proposed the following

1 language, then she had a redraft of the earlier
2 indemnification provision that we've been discussing with
3 plaintiffs' counsel.

4 THE COURT: All right. Ms. Tenzer, is this, the
5 indemnification, is that something that the vendor is
6 insisting?

7 MS. TENZER: Your Honor, it is an issue between the
8 vendor and the defendant. We really don't have, you know, a
9 dog in that fight, so to speak. It's our understanding the
10 vendor has been trying, as Mr. DiNucci indicated, by making
11 alternative proposals and I think is trying to work something
12 out with the defendants. And, you know, again, it's not sort
13 of our issue, but if there's anything that we could do to help
14 facilitate those negotiations, obviously, we're happy to do
15 that. But that is, as we understand, the one outstanding item
16 and it is something that the vendor is looking for and that I
17 believe is sort of -- is the standard in these kinds of
18 contracts. But, again, it's my understanding that they are
19 trying to work with defense counsel to try to work something
20 out.

21 THE COURT: Okay. All right.

22 Mr. Jones and Mr. Campbell, do you all have anything
23 to add?

24 MR. JONES: I don't, Your Honor. This is Bryan
25 Jones.

1 MR. CAMPBELL: This is Dave Campbell. I would just
2 add that my client's electronic devices are still in the
3 possession of the FBI. And I think we're not really involved
4 in this dispute, haven't been asked to endorse the contract.
5 I just wanted to make sure I participated because I've seen a
6 lot of information seemed to reference potential problems with
7 timing and that kind of thing, so I just wanted to make sure I
8 was on the call for anything in that regard.

9 THE COURT: All right. I got you.

10 MR. CAMPBELL: Yes, sir.

11 THE COURT: Well, you know, this does seem like this
12 is an issue -- well, it is an issue between the vendor and the
13 defendants at this point. And this has just got to move
14 forward. This one issue cannot throw off the entire case
15 schedule.

16 So, Mr. Kolenich and Mr. DiNucci and Mr. Jones, you
17 all will need to just, and encourage the plaintiffs to try and
18 facilitate this as best as possible to move things forward.
19 But you all just need to, you know, have some more discussions
20 with the vendor. But this contract has got to be signed by
21 Friday, whatever form the indemnification is in or not. And
22 I'm not going to -- you know, without having the third-party
23 vendor on the phone, I'm not going to tell them they have to
24 give up that, you know, that language if that's a customary
25 provision that's in the agreements that they use. So, what I

1 would like you all to do is to wrap up the negotiations on
2 that and have the contract signed by this Friday.

3 MR. DINUCCI: Your Honor, could I inquire of the
4 court on a particular point?

5 THE COURT: Sure.

6 MR. DINUCCI: I clearly understand your point that
7 we're going to have to wrap this up, and that the vendor, if
8 it is customary, we'll get language saying that the defendants
9 have to indemnify the vendor if third parties complain that
10 their confidential information has been leaked, for lack of a
11 better word. That's indemnification issue number one.

12 But indemnification issue two is why should the
13 defendants have to pay if for some reason the plaintiffs call
14 the third-party vendor as a witness in this lawsuit? That
15 should be the plaintiffs' responsibility if for some reason
16 they think they need testimony from the third-party vendor.

17 MS. TENZER: Your Honor, if I may. I don't
18 understand that to be an issue. But I will say that if that
19 is the issue, if we were to call the third-party vendor in
20 this litigation, which -- we would not ask the defendants to
21 pay for that.

22 THE COURT: Yeah. I would think that whatever party
23 calls the vendor would be responsible for paying that.

24 MR. DINUCCI: Thank you.

25 THE COURT: Okay. Now, Ms. Tenzer, you've asked if

1 the devices would be turned over at the time, and social media
2 accounts, is access to those provided at the time that the
3 contract is entered into?

4 Mr. Kolenich, is there any problem with that? It
5 does seem like these things need to be provided to the vendor
6 as soon as possible.

7 MR. KOLENICH: I'm sorry, Your Honor, are you
8 discussing turning over the parties' electronic devices?

9 THE COURT: That's right.

10 MR. KOLENICH: No. As I understand it, there's
11 no -- most of my clients are squared away with just sending it
12 in these Faraday bags that the vendors will send. One or two
13 of them, like, if there's a larger device, if there's
14 someplace they can meet near where the client is. I think the
15 third-party vendor is used to dealing with this issue. I
16 don't foresee it being a problem. All of my people, as best I
17 can tell, and as you know I have a large number of individuals
18 I'm representing, I understand that they're going to have to
19 turn these devices over and they're prepared to do it.
20 They're prepared to be without their devices for a day, day
21 and a half, whatever it is, two days, you know, to send it
22 there, have it imaged and sent back.

23 THE COURT: Okay. All right. Mr. DiNucci.

24 MR. DINUCCI: I actually have two of my clients'
25 devices here, Your Honor. We're just waiting to see what

1 we're told to do and how to do it by the third-party vendor.
2 The idea is to get them done expeditiously so we can get the
3 original devices back. I think there the interests of both
4 sides converge.

5 THE COURT: Okay. And Mr. Jones.

6 MR. JONES: Yes, Your Honor. I have one client who,
7 you know, the phone that he uses and that will need to be
8 imaged is both his only personal phone and his work phone. So
9 we'll just need to make arrangements, but he is certainly
10 willing to comply. I had talked to him previous, one of the
11 plaintiffs' counsel about setting something up where he could
12 just go plug it in in home town, you know, where he lives, so
13 he doesn't have to mail it out. But he's certainly willing to
14 comply and turn it over.

15 THE COURT: Okay. All right. And, Ms. Tenzer, is
16 there -- do you have concerns about the timing there? It
17 sounds like it would be the third-party vendor would provide
18 the means for the defendants to submit their devices. And
19 then, you know, any other -- if there's social media access,
20 things like that.

21 MS. TENZER: No. I appreciate what defense counsel
22 has said on the phone. I think that, in addition, the
23 vendor -- again, I don't want to speak for the vendor -- but I
24 think the vendor will need certain credentials and so forth to
25 be able to get into the devices and the social media accounts.

1 And it may be useful if defense counsel can start
2 pulling those all together to provide to the vendor so that
3 once they get the devices and the account, they can
4 immediately start performing the work that they need.

5 I'll also just add that, you know, we -- again, we
6 appreciate that everybody wants to do this expeditiously. I
7 think we probably want to have some sort of media status
8 conference or something with the Court to ensure that
9 everything is moving forward once the contract is signed.

10 MR. DINUCCI: Can I interject a comment?

11 THE COURT: Sure. Go ahead.

12 MR. DINUCCI: This is coming from a technical
13 incompetent; me. I think it would be helpful if as we work
14 with the third-party vendor on the contract, we also learn
15 directly from the third-party vendor what it would need to
16 access these social media accounts. I don't even know the
17 nomenclature, so if the third-party vendor can tell us what it
18 needs in simple English it would be helpful.

19 MS. TENZER: I agree. And I think it probably makes
20 sense to set up a call with the vendor this week, which we
21 would not participate in but the defense counsel and the
22 vendor could participate.

23 THE COURT: You know, I think that would make some
24 sense. Mr. DiNucci and defense counsel, are you all amenable
25 to setting up a call or for having some way of getting the

1 information from the third-party vendor so that you all can be
2 ready to comply with their instructions?

3 MR. DINUCCI: Certainly. No problem here,
4 Your Honor.

5 MR. KOLENICH: Yeah, we'll communicate with the
6 vendor and get that done.

7 THE COURT: Okay.

8 MR. JONES: Not a problem.

9 MR. CAMPBELL: Judge, I'm happy, if I need to, but
10 my understanding is I don't, but I'll certainly make myself
11 available if I need to.

12 THE COURT: Okay. All right. What else? What else
13 do we need to address at this point? I know there aren't any
14 deadlines in the stipulation about how long counsel will need
15 to review the documents or the -- what's received from the
16 third-party vendor for responsiveness and privilege and so
17 forth and then to produce that information. But that may be
18 something that we'll, you know, that we need to go ahead and
19 figure out a time frame for.

20 MS. TENZER: Your Honor.

21 THE COURT: Yes.

22 MS. TENZER: I do think along those lines another
23 thing that the parties could be doing to help make this move
24 forward as quickly as possible would be in light of the topic
25 that you just raised, the review of the documents by defense

1 counsel, I think under the stipulation there's supposed to be
2 a negotiation regarding search terms and those types of
3 things. If we could start doing that sooner rather than
4 later, that would probably help to move things along.

5 THE COURT: Yeah. Mr. Kolenich, what do you think
6 about that, go ahead and start talking about search terms?

7 MR. KOLENICH: We can.

8 THE COURT: Start talking about how long you all
9 think you may need to perform that review, then produce the
10 documents.

11 MR. KOLENICH: Well, that gets again to the issue of
12 who's footing the bill for those, which is plaintiffs on the
13 first instance. It's been my experience that the third-party
14 vendors can expedite review of the results and these images
15 for an advanced fee, or an additional fee. And that can be
16 done in just a couple days per device. So the imaging takes a
17 day, you know, and the turn around of the second day is just
18 mailing it back. Then they have the data, they do their
19 initial processing of the data, then we submit search terms
20 for X time limitations, whatever it is we're going to submit.

21 I don't think there's any negotiation between the
22 parties on that. Whatever the plaintiffs want to search for,
23 they can search for. That's the point of this exercise. Then
24 we do the review for privilege, creative privilege or
25 production. As long as the third-party vendor, and they

1 always have been in my experience, is willing to expedite that
2 for us so that we don't have to go and fumble through the
3 relativity on our own, which would delay things. There's
4 going to be a fee for that. As long as plaintiffs' foot the
5 bill for that in the first instance, I think the turnaround
6 time can be just a couple days per device. The third-party
7 vendor will give us the results of the searches. We'll tell
8 them what needs to be redacted from the privilege log, that's
9 a quick process, as long as somebody is footing the bill for
10 their participation.

11 THE COURT: All right. Ms. Tenzer, what's your view
12 of that?

13 MS. TENZER: Frankly, I'm not sure I understand what
14 Mr. Kolenich is saying. In my limited experience, you mean
15 the data will be processed by the vendor and then the
16 attorneys review the documents. You agree on search terms,
17 they get run against the data, and then attorneys review the
18 data. I don't know what other procedures Mr. Kolenich is
19 referring to. I mean, we're happy to discuss whatever
20 processes he's talking about, but I'm -- I'm not sure I know
21 what he's talking about.

22 THE COURT: Well, is it your understanding that the
23 third-party vendor will receive search terms from the parties
24 and then mirror the universe of documents? Is that the
25 process?

1 MS. TENZER: Yeah. If the vendor will run search
2 terms against the data, yes.

3 THE COURT: And then it would be from that career
4 path to the search terms that narrow the documents that the
5 defendants would then do their review for privilege and
6 responsiveness.

7 MS. TENZER: Exactly.

8 THE COURT: All right. Mr. Kolenich, so would
9 that --

10 MR. KOLENICH: That's all correct, Your Honor. It's
11 just that it goes a lot faster with the ESI professionals
12 assisting us with the search. And they always add a charge
13 for that service, in my experience. Again, my experience is
14 also limited. I don't mean to try to trump Ms. Tanzer's
15 experience, she's certainly superior to mine, but --

16 MS. TENZER: I don't know about that.

17 THE COURT: All right. Mr. Kolenich, the search
18 that you're talking about is after -- after the fact.

19 MR. KOLENICH: After. Right.

20 Just for creating a privilege log and then they get
21 production, they have it.

22 THE COURT: Okay. Well, why don't -- here's what I
23 would suggest. Why don't you all talk this through a bit more
24 about the timing and the different steps and how, you know,
25 how the search and the review and the production will go and

1 see if you all can't come up with some guidelines and some
2 deadlines for that. And if there are issues, let me know.
3 We'll probably need to talk about how that fits into the
4 overall schedule. And perhaps we can -- perhaps we can do
5 that and see how the -- I guess the delivery of the devices
6 and social media accounts, how that is all progressing. We
7 can do that all at a status conference. And perhaps next
8 Friday? Or Thursday?

9 MS. TENZER: That sounds like a great plan,
10 Your Honor.

11 THE COURT: Why don't we -- do you all want to do
12 next Thursday afternoon? I'll get Karen to confirm, but I do
13 have some time later in the afternoon on Thursday.

14 MS. TENZER: That works for plaintiff, Your Honor.

15 MR. KOLENICH: That would work, I'm available.

16 THE COURT: Let's see, Mr. Kolenich, are you
17 available sometime that afternoon?

18 MR. KOLENICH: Yes, sir.

19 THE COURT: All right. Mr. DiNucci, are you
20 available that afternoon as well?

21 MR. DINUCCI: Yes, I am, Your Honor.

22 THE COURT: Okay. Mr. Jones?

23 MR. JONES: Yes, Your Honor, I'm available.

24 THE COURT: Okay. Again, Mr. Campbell, at this
25 point I don't know that that's something that you would need

1 to participate in.

2 Ms. Tenzer, do you have a different view?

3 MS. TENZER: No, Your Honor, I don't believe that

4 Mr. Fields is part of the stipulation.

5 THE COURT: Okay.

6 MR. CAMPBELL: That sounds good. I would just
7 mention if anyone is ever discussing moving the trial date or
8 anything along those lines, I would ask to be a part of that
9 conversation.

10 THE COURT: Okay. Why don't you plan -- since we
11 will be discussing scheduling issues, why don't you plan on
12 calling in.

13 MR. CAMPBELL: Yes, sir.

14 THE COURT: Next Thursday. Why don't we -- does
15 3:00 work for everybody?

16 MR. KOLENICH: (Inaudible.)

17 MR. DINUCCI: Yes, Your Honor.

18 THE COURT: Okay.

19 All right. Let's plan on that. We'll get a notice
20 out for a conference call for next Thursday, which the 21st,
21 at 3:00 p.m.

22 Now, Ms. Tenzer, is there anything else that we need
23 to address today?

24 MS. TENZER: There is one other thing we wanted to
25 mention, Your Honor, and see if you could advise us. And I

1 apologize for bringing it up without having previewed it. But
2 we had served a subpoena on Twitter early last year. And you
3 may recall, this is Mr. Peinovich had moved to quash and
4 Your Honor denied that motion. Mr. Peinovich then appealed
5 your decision to Judge Moon. Judge Moon then issued his
6 decision on the motion to dismiss and dismissed Mr. Peinovich
7 from the case and then asked the parties to meet and confer
8 and advise the Court whether they thought any additional
9 briefing would be needed based on Mr. Peinovich's change in
10 status. And the parties made those filings. But Judge Moon
11 has yet to do anything on Mr. Peinovich's appeal of your
12 decision. And we were sort of hoping you could give us some
13 advice as to what we might do to get that taken care of so
14 that we could hopefully move forward with the subpoena on
15 Twitter.

16 THE COURT: Okay. We'll notify Judge Moon's
17 chambers that that is a live issue that you all want to move
18 forward on and make sure that they're aware of that.

19 MS. TENZER: Thank you, Your Honor. We appreciate
20 that.

21 THE COURT: All right. Anything from the
22 defendants' side that we should address today?

23 MR. KOLENICH: No, sir.

24 THE COURT: All right.

25 MR. DINUCCI: No, Your Honor.

1 THE COURT: Okay. Well, counsel, thank you all for
2 calling in and we'll be back on the phone next Thursday.
3 Thank you.

4 MS. TENZER: Thank you, Your Honor.

5 (Teleconference concluded at 1:00:52 p.m.)

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REPORTER'S CERTIFICATE

I, DONNA J. PRATHER, do hereby certify that the above and foregoing, consisting of the preceding 23 pages, constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 19th day of February, 2019.

Donna J. Prather

DONNA J. PRATHER, RPR, CRR, CBC, CCP
Federal Official Court Reporter